NATIVE TITLE HOT SPOTS

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Contents

National Native Title Tribunal

Registration test review – factual basis

Gudjala # 2 v Native Title Registrar [2008] FCAFC 157 (Full Court)

French, Moore and Lindgren JJ, 27 August 2008

Issue

The main issue in these appeal proceedings was whether the primary judge's approach to assessing an anthropological report provided for the purposes of s. 190B(5) of the *Native Title Act 1993* (Cwlth) (NTA), a condition of the registration test dealing with the sufficiency of the factual basis provided to support the claim, was correct.

The Full Court allowed the appeal, finding that the primary judge's approach involved the application of a more onerous standard than s. 190B(5) required. The matter was remitted to the primary judge for reconsideration in accordance with the court's reasons for judgment.

Background

The claimant application under consideration in this case was made on behalf of the Gudjala People in April 2006 (Gudjala People #2). It covers an area in Queensland. In November 2006, a delegate of the Native Title Registrar decided it must not be accepted for registration because it did not meet various conditions of the registration test. (Pursuant to s. 190A(6), a claimant application must meet all of the conditions of the test if it is to be accepted for registration.) Subsequently, the applicant filed a claim registration review application pursuant to ss. 69(1) and 190D(2) (as it was then – now, see s. 190F).

In August 2007, his Honour Justice Dowsett found that the application did not meet the conditions found in ss. 190B(5), 190B(6) and 190B(7) and so dismissed the application for review—see *Gudjala People # 2 v Native Title Registrar* [2007] FCA 1167, summarised in *Native Title Hot Spots* Issue 26.

In November 2007, an application for leave to appeal out of time against that judgment was filed on behalf of the Gudjala People. Leave to do so was granted unopposed at the commencement of the Full Court hearing in May 2008.

Statutory framework

Their Honours Justices French, Moore and Lindgren set out the relevant provisions of the NTA. Two of those provisions are of particular importance in this case.

The first is s. 62(2)(e), which requires that a claimant application must contain 'a general description of the factual basis on which it is asserted that the native title rights and interests claimed exist' and, in particular, that:

- the native title claim group have, and the predecessors of those persons had, an association with the area – s. 62(2)(e)(i); and
- there exist traditional laws and customs that give rise to the claimed native title – s. 62(2)(e)(ii); and

- the native title claim group have continued to hold the native title in accordance with those traditional laws and customs – s. 62(2)(e)(iii).

The second is s. 190B(5), which provides that the Registrar must be satisfied that the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support that assertion. In particular, the Registrar must be satisfied that the factual basis is sufficient to support the assertions that:

- the native title claim group have, and the predecessors of those persons had, an association with the area – s. 190B(5)(a); and
- there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests – s. 190B(5)(b); and
- the native title claim group have continued to hold the native title in accordance with those traditional laws and customs – s. 190B(5)(c).

Note that s. 190B(5)(b) includes a requirement that s. 62(2)(e)(ii) does not i.e. that there exist traditional laws *acknowledged by, and traditional customs observed by, the native title claim group* that give rise to the claim to native title rights and interests.

Native title rights and interests claimed

Where it could be recognised, the native title right to possession, occupation, use and enjoyment as against the whole world was claimed. Over the remainder of the area covered by the application, 11 specific rights were claimed on a non-exclusive basis, including rights of access, rights to camp, fish and hunt, rights to take and use the natural resources and rights in relation to cultural and spiritual matters.

Material going to factual basis

In this case, the following statement was made at Schedule F of the application form:

> The native title rights and interests claimed are those possessed under the traditional laws and customs of the Gudjala People which together form part of a body of customary law that is part of a broader system of Aboriginal culture. The broader system is a comprehensive body of law covering cultural values, norms of social behaviour and principles that comprise the land law component of that body of law that govern the landed interests of the claim group. The acquisition of land interests is by descent from ancestors and derived from fundamental rights of possession and ownership of land.

The 'examples' of 'facts giving rise to the assertion of native title' given at Schedule F were that members of the claim group continue to:

- have a close association, including a spiritual connection with the claim area according to their traditional laws and customs;
- pass on to their descendants the body of traditional laws and customs, rights to conduct activities under those traditional laws and customs and stories and beliefs concerning their traditional country, including the claim area;
- use the claim area for traditional hunting and fishing and for the gathering of traditional bush medicines and other materials;
- care for their traditional country, including the claim area, in accordance with traditional laws and customs passed down to them by their forebears and predecessors;

- exercise a body of traditional laws and customs which has been passed down to them from generation to generation by their forbears and predecessors, including traditional laws and customs dealing with caring for country, controlling access to country by members of the native title claim group, the holding of ceremonies on traditional country and the use of traditional country.

In addition, the applicant had incorporated into the application both a report by Rod Hagen, an anthropologist, and the affidavit of a member of the claim group, William Santo.

Therefore, the materials provided in the application in this case as a 'general description' of the factual basis for the purposes of s. 62(2)(e) were the statements and information made in Schedule F, Mr Hagen's report and Mr Santo's affidavit evidence.

On several occasions, their Honours emphasised that the affidavits of those comprising the applicant filed for the purposes of s. 62(1)(a) (which the court referred to as the 'standard form verifying affidavits') all stated (as they were required to do) that the deponent believed that all the statements made in the application were true—at [23], [91], [92] and [96].

Anthropological report

Their Honours canvassed at some length the contents of this report, noting (among other things) that Mr Hagen:

- described himself as an anthropologist who had worked intermittently with members of the Gudjala group since June 2000 and on similar matters in other parts of Australia since October 1975;
- had been asked to comment on the factual basis for the asserted native title rights and interests claimed in the Gudjala application;
- had reviewed a wide range of materials relating to the area and spoken with both members of the native title claim group and 'many others in the general vicinity';
- explained the relationship of particular 'Gudjala families' with the four apical ancestors named in the application;
- said that the available materials supported the identification of the current claimants as members of the Gudjala group on the basis of descent from those apical ancestors, that contemporary members of the claim group continued to maintain an association with the Gudjala area and that this included maintenance of 'an unbroken chain of occupation of the overall claim area';
- said that documentary support for Gudjala interests in the claim area could be drawn from a number of earlier authors specified in the report and that, on the basis of available material, it could 'reasonably be concluded' that the lands subject to the claim 'traditionally belonged to the Gudjala';
- identified from earlier writing on Indigenous connections to land in north west Queensland four underlying principles of 'law' and that 'general government of the community' lay in the hands of 'an assembly of elders';
- found that establishment of 'ancestral connection' with an area 'to the satisfaction of the community' was of principal importance and those who now live in other areas, but possess an ancestral connection, are recognised by the Gudjala community while those arrived only in 'historical' times are generally not;

- opined that 'the framework of the law thus set out' provided a basis upon which it was possible for 'Indigenous people in the area to determine who belongs where, who has the right to make decisions concerning land related matters and who has a right to receive benefits flowing from activities on the land';
- stated that 'the indigenous community associated with the Gudjala area' had not 'abandoned the legal principles on which its system of land tenure was based and continues today to be guided by laws and customs which have their origins in pre-contact time'—at [24] to [41].

Mr Hagen's conclusions were that:

> The native title claim group have, and the predecessors of those persons had, an association with the area. The areas concerned are traditionally associated with the Gudjala peoples. The current claimants are members of this group by descent. Members of the group continue to reside within their traditional lands and to pursue other land based activity upon them.
>
> The native title claim group continues to acknowledge and observe traditional laws and customs pertaining to land in the area. Discussion of such laws and customs in the early literature pertaining to the area, and my own observations of their activity today, indicates a high degree of congruence between underlying legal principles followed then and now.
>
> The native title claim group's ongoing observance of traditional laws and customs is consistent with the maintenance of traditional rights and interests in the land subject to the claim.

Additional affidavit material in the application

Their Honours then set out the matters to which Mr Santos deposed, which included:

- his descent from one of the named apical ancestors and the life-long relationship of his grandfather with the claim area;
- how his father had lived in the area most of his life, with only a short period of absence that was brought about as a result of his removal from the area;
- how Mr Santos had lived in the area all his life and, as a child, been taught by his elders how to hunt and fish and how to behave so as not to disturb the spirits;
- that he taught Gudjala children about areas of importance and how to fish and worked to preserve and pass on the Gudjala language.

There was also an affidavit from Stella McLean, a member of the claim group, attesting to her connection to the claim area. This affidavit, along with the material provided at Schedule F and a general statement at Schedule M, was relied upon in relation to s. 190B(7), pursuant to which the Registrar must be satisfied that:

- at least one member of the native title claim group currently has or previously had a traditional physical connection with any part of the land or waters covered by the application; or
- previously had, and would reasonably have been expected currently to have, such a connection but for things done (other than the creation of an interest in relation to land or waters) by the Crown, a statutory authority of the Crown, the holder of a lease over any of the land or waters or a person acting on behalf of such a lessee.

Primary judge's analysis of the requirements of s. 190B(5)

After setting out a summary of the delegate's findings, the court turned to Dowsett J's reasons for judgment. After noting that his Honour (unlike the delegate) was satisfied that the claim group description was sufficient for the purposes of s. 190B(3), their Honours set out Dowsett J's analysis of the requirements of s. 190B(5) which was, in brief, that:

- the delegate must be satisfied that there was an 'alleged' factual basis sufficient to support the assertion that the claim group was entitled to the claimed native title rights and interests;
- this meant that the 'alleged facts' must support the claim that the identified claim group (and not another) held the identified rights and interests (and not some other rights and interests);
- in relation to s. 190B(5)(a), there 'must be evidence that there is an association between the whole group and the area' and evidence of such an association between the predecessors of the whole group and the area over the period since sovereignty;
- in relation to s. 190B(5)(b), traditional laws and customs must, in order to answer that description, be sourced in a pre-sovereignty society and have been observed since that time by a continuing society, referring to *Members of the Yorta Yorta Aboriginal Community v Victoria* 214 CLR 422 (*Yorta Yorta*), but that this did not require that the apical ancestors themselves comprised a society;
- the task under s. 190B(5)(b) in this case was the identification of a society of people living according to identifiable laws and customs having a normative content at the existence in 1850-1860, the time of first European contact;
- those laws and customs must establish normal standards of conduct or, perhaps be prescriptive of such standards;
- while it was not necessary to show that the apical ancestors were members of the society and were used only to define the claim group, a link would have to be identified between the apical ancestors and any society existing at sovereignty, even if it arose at a later stage;
- satisfying s. 190B(5)(c) would rest on the demonstration of the existence, at the time of sovereignty, of a society observing laws and customs from which current traditional laws and customs were derived—at [68] to [72] and [77].

Primary judge on the evidence for s. 190B(5)

The court noted that Dowsett J was of the view that s. 190B(5)(a) was not met because:

- the affidavit evidence of Mr Santos and Ms McLean did not show an association between the predecessors of the whole group and the area over the period since sovereignty;
- Mr Hagen's evidence provided opinions and conclusions rather than any alleged factual basis for those opinions and conclusions or for the claim;
- the application did not demonstrate the relevant association.

As to the reasons for finding that s. 190B(5)(b) was not met, the court noted Dowsett J's findings that:

- there was no evidence of any known connection between the three relevant apical ancestors, save for their presence in a relatively large area;
- none lived in isolation, each had parents and, apparently, children so it might be inferred they had siblings and other members of extended families;

- two of them apparently lived on stations but there was no evidence of the relationship between station owners and Indigenous employees, on the one hand, and any pre-existing indigenous society on the other;
- there was no factual basis for inferring that there was a society defined by its acknowledgement and observation of laws and customs;
- there was only scant evidence of contact in modern times amongst the family groups identified by Mr Hagen;
- on the material available to the court, no factual basis could be found that was supportive of an inference that there was, in 1850-1860, an indigenous society in the area, observing identifiable laws and customs;
- while it was not necessary to consider it, the evidence concerning the broader question whether there are laws and customs acknowledged and observed by the claim group currently that have their origins at, or before, European occupation was scant;
- while some of Mr Santo's evidence might be said to describe laws and customs of a normative character, and to assert rights and interests in land, none of it identified traditional laws and customs derived from a pre-sovereignty society supporting or justifying the claim group's claims;
- it was impossible to understand why descendants of the identified apical ancestors had rights and interests in the land whereas others did not;
- there was no clear basis for Mr Hagen's opinion that it could reasonably be concluded that the claim area belonged to the Gudjala people;
- Mr Hagen offered no real basis for inferring that the Indigenous community associated with the Gudjala area had 'clearly not abandoned the legal principles on which their system of land tenure is based and continue to today to be guided by laws and customs which have their origin in pre-contact time';
- while he might have described the society having apparently traditional laws and customs, there was no basis for inferring that they originated in any pre-sovereignty society;
- some or all of the traditional laws and customs may have been handed down through two or more generations but it was impossible to say any more than that;
- the two 'real deficiencies' in the application were that it failed to explain how, by reference to traditional law and customs presently acknowledged and observed, the claim group was limited to descendants of the identified apical ancestors and no basis was shown for inferring that there was, at and prior to 1850-1860, a society which had a system of laws and customs from which relevant existing laws and customs were derived and traditionally passed on to the existing claim group.

The court noted Dowsett J took the view that the application did not meet the test at s. 190B(5)(c) because the applicant was unable to demonstrate the existence, at the time of sovereignty, of a society observing laws and customs from which current traditional laws and customs were derived.

Dowsett J's view that, since s. 190B(5) was not met, it followed that the requirements of s. 190B(6) had not been satisfied was also noted. As to s. 190B(7), it was noted that his Honour:

- took the reference to 'traditional physical connection' as denoting that the relevant connection was in accordance with laws and customs of the group having their origin in pre-contact society, referring to *Yorta Yorta*;
- found that, as there was no basis for inferring there was a society of the relevant kind as at the date of European settlement, the application did not satisfy s. 190B(7).

Grounds of appeal

The grounds of appeal were, in summary, that Dowsett J:

- failed to find that the factual assertions in the materials provided to the delegate, if proven, would be sufficient for a court to draw such inferences as would be necessary for it to find that s. 190B(5) was met;
- applied the wrong tests in relation to the requirements of s 190B(5) by:
  - imposing a burden of proof not required or intended by s 190B(5);
  - requiring that the factual basis on which it is asserted that the native title rights and interests claimed exist must 'lead to' certain conclusions, as distinct from must be 'sufficient to support' the assertions identified in s 190B(5);
  - disregarding Mr Hagen's assertions because they comprised opinions and conclusions rather than, or without demonstrating, an alleged factual basis for such opinions and conclusions;
  - failing to have regard to the fact that a court can, and will often need to, draw inferences, without 'hard evidence', in relation to facts and circumstances at about and prior to European settlement;
- erred in his consideration of ss. 190B(6) and 190B(7) because of the errors made in relation to consideration of s. 190B(5).

The Registrar's function

Their Honours endorsed the views of His Honour Justice Mansfield in *Northern Territory v Doepel* (2003) 133 FCR 112 (*Doepel*) at [16] as to the Registrar's 'general functions' under s. 190A, including that:

- in considering ss. 190B(2), 190B(3) and 190B(4), the Registrar may not go beyond what is contained in the application;
- however, ss. 190B(5), 190B(6) and 190B(7) 'clearly' call for consideration of material that may go beyond the terms of the application.

Their Honours agreed with, and adopted, what was said in *Doepel* at [17] as to the 'characterisation of the criterion set out' in s. 190B(5):

> S[ubs]ection 190B(5) is carefully expressed. It requires the Registrar to consider whether the "factual basis on which it is asserted" that the claimed native title rights and interests exist "is sufficient to support the assertion". That requires the Registrar to address the quality of the asserted factual basis for those claimed rights and interests; *but only in the sense of ensuring that, if they are true, they can support the existence of those claimed rights and interests*. In other words, the Registrar is required to determine whether the asserted facts can support the claimed conclusions. The role is not to test whether the asserted facts will or may be proved at the hearing, or to assess the strength of the evidence which may ultimately be adduced to establish the asserted facts (their Honours' emphasis).

The court also referred to *Martin v Native Title Registrar* [2001] FCA 16 (*Martin*) at [22], where French J said, in relation to s. 190B(5)(a), that:

> What …[the delegate] had to be satisfied of was that the factual basis on which it was asserted that the native title rights and interests claimed exist supported the proposition that the native title claim group and the predecessors of those persons had an association with the area.

The distinction Mansfield J made in *Doepel* at [18] between the Registrar's task under s. 190B(5) and that imposed by s. 190B(7) was also noted with approval. Mansfield J found that:

- subsection 190B(7) required the Registrar 'to be satisfied of a particular fact or particular facts' and, therefore, 'required the presentation of evidentiary material';
- however, the focus of the Registrar's task was not the same as that of the court when hearing and determining the application;
- the focus of the Registrar's task was upon the relationship of at least one member of the claim group with some part of the claim area, which required 'some measure of substantive (as distinct from procedural) quality control upon the application if it was to be accepted for registration'.

Doepel and *Martin* were said to:

> [S]ufficiently describe the law applicable to the function of the Registrar or his delegate in the present case and the principles which inform the Court's approach to review of the Registrar's or delegate's decision—at [85].

Nature of the review

After noting that the function undertaken by Dowsett J was 'a review of the Registrar's decision not to accept the claim' pursuant to s. 190D(2) (now s. 190F), the court endorsed the view that:

- the right of review places 'the controversy constituted by the issues of fact and law raised between the parties' before the court;
- upon a ground of review being established, appropriate orders may be made to do justice between the parties in the court's discretion in the exercise of its original jurisdiction;
- the review may require redetermination of factual issues according to the material then available and so is not restricted to the material before the Registrar;
- at the time of review, the court may take into account events that have occurred since the decision under review was made by the Registrar—see [86] to [89], referring to *Western Australia v Strickland* (2000) 99 FCR 33 at [63] and *Wakaman People No 2 v Native Title Registrar* (2006) 155 FCR 107 at [29].

Correct approach to s. 190B(5)

In considering whether or not Dowsett J's approach was correct, the court thought a consideration of 'the interaction between' ss. 62 and 190A was a 'convenient' place to start, with their Honours noting that:

- section 62 'prescribes what an applicant must do to commence an application';
- section 190A 'establishes a statutory regime under which the Registrar…assesses the application to determine whether it should be accepted'—at [90].

The court was of the view that:

- it was 'tolerably clear' that what the Registrar's assessment entailed was 'informed by what is required of an applicant to commence an application';
- an application and accompanying affidavit which, in combination, addressed 'fully and comprehensively all the matters specified' in s. 62 might contain enough information to satisfy the Registrar about 'all matters referred to' in s. 190B—at [90].

This suggested to their Honours that:

> [T]he quality and nature of the information necessary to satisfy the Registrar will be of the same *general* quality and nature as the information required to be included in the application and accompanying affidavit [pursuant to s. 62]—at [90], emphasis added.

However, as the court pointed out:

> Of course, if an applicant fails to *fully and comprehensively* furnish the information required by s 62 then there is a risk that the Registrar will not accept the claim although that risk is ameliorated [in relation to ss. 190B(5) to 190B(7)] by the power of the Registrar to consider information additional to that contained in the application, including documents (other than the application) provided by an applicant: see s 190A(3)(a)—at [90], emphasis added.

Their Honours noted (among other things) that:

> There is an obvious link between the requirement that the evidence of the applicant [i.e. the affidavit required by s. 62(1)] include a statement that the applicant believes that all the statements in the application are true and the requirement that the application contain the details specified in s 62(2) together with the identification of the details in that subsection—at [91].

What was of 'central importance' in this case was the details specified in s. 62(2)(e) i.e. 'details that constitute a general description of the factual basis on which it is asserted that the native title rights and interests claimed existed and, in particular, the matters referred to in ss 62(2)(e) (i), (ii) and (iii)', which are 'are in aid of the description, with some particularity, required by s 62(2)(d) of the asserted native title rights and interests'—at [92].

In their Honours' view:

- the fact that the detail specified by s. 62(2)(e) is described as 'a general description of the factual basis' is an 'important indicator of the nature and quality of the information required' by s. 62;
- an applicant is only required to give a general description of the factual basis of the claim and provide evidence in the s. 62(1)(a) affidavit that the applicant believes the statements in that general description are true;
- the applicant is not required to provide anything more than a general description of the factual basis on which the application is based and, in particular, is not required to 'provide evidence of the type which, if furnished in subsequent proceedings, would be required to prove all matters needed to make out the claim';
- nor is the applicant required to 'provide evidence that proves directly or by inference the facts necessary to establish the claim'—at [92].

However, the court did point out that:

> [T]he general description [for the purposes of s. 62] must be in sufficient detail to *enable a genuine assessment of the application by the Registrar* under s 190A and related sections, *and* be *something more than assertions at a high level of generality*—at [92], emphasis added.

The specifics of this case

Some of Dowsett J's observations were said to suggest he thought the material before the Registrar should be 'evaluated as if it was evidence furnished in support of the claim'. If, 'in truth', this was the approach adopted, then the court was of the view that 'it involved error' on Dowsett J's behalf—at [93]

However, this was *not* the reason for the court's conclusion that the appeal should be allowed. The reason for allowing the appeal was that Dowsett J 'was critical of, and in many respects did not accept, the opinions expressed by Mr Hagen' e.g. Dowsett J said Mr Hagen's 'evidence provides opinions and conclusions rather than any alleged factual basis for such opinions and conclusions or for the claim'—at [93].

Their Honours were of the view that:

> Mr Hagen's report contained much material which, *if accepted as a recitation of facts*, went *a considerable way* towards establishing the factual basis asserted by the applicant in relation to the various matters referred to in s 190B(5)—at [94], emphasis added.

The court noted two recent decisions on the role of anthropological reports in native title proceedings. In those cases, it was found (among other things) that, where a question of admissibility arises on a trial of the application:

- there is no requirement that the facts upon which the expert's opinion has been formed be supported by admissible evidence;
- subject to some exceptions, hearsay material on which an expert's opinion is based will qualify for admission as relevant to the basis upon which the expert holds the opinion and, if it so qualifies, it can then be used as proof of the fact intended to be asserted;
- it is well established that, as a basis for their opinions, experts are entitled to rely upon reputable articles, publications and material produced by others in the area in which they have expertise and they may not only base their opinions on such sources but also give evidence of fact which is based upon them;
- the weight to be accorded to such evidence is a matter for the court;
- direct evidence of an anthropologist's observations is admissible in the ordinary course—at [94] to [95], referring to the Full Court in *Bodney v Bennell* (2008) 167 FCR 84 at [88] to [94] and Lindgren J in *Alphapharm Pty Ltd v H Lundbeck A/S* [2008] FCA 559.

Mr Hagen's report 'did not fall for consideration by reference to questions of admissibility that would arise on a trial of the application'—at [95].

However, the reference to the case law on admissibility at trial appears to have been made in order to reinforce, and perhaps expand on, was said in *Doepel* i.e. in the context of assessing an application against the registration test, the matters covered in such reports can, and should, be treated as a 'recitation of the facts', with the relevant task then being to ensure that those facts are sufficient to support the three assertions found in ss. 190B(5)(a) to 190B(5)(c).

The court was of the view that Dowsett J's 'general approach' to Mr Hagen's evidence 'affected his approach in assessing the matters required to be considered' by s. 190B(5)

giving, as an example, Dowsett J's comment that, on the material available, he could find *no* factual basis 'supportive of an inference that there was, in 1850-1860, an indigenous society in the area, observing identifiable laws and customs'—at [96].

In their Honours' opinion:

> Mr Hagen's report, *which formed part of the application* (and in respect of which there were affidavits from members of the claim group saying the *statements in the application were true*), contained several statements which, together, would have provided material upon which a decision maker could be satisfied that there was, in 1850-1860, an indigenous society in the claim area observing identifiable laws and customs—at [96], emphasis added.

It was accepted that the report did not deal 'in direct and unequivocal terms' with that question and others that s. 190B 'requires must be addressed'. However:

> [I]t is not true that his report provides *no* factual basis in the way described by his Honour. Had his Honour given appropriate weight to Mr Hagen's report, that report together with other material could well have sustained a conclusion that the application should be accepted—at [95], emphasis added.

Decision

The court decided to allow the appeal and set aside Dowsett J's orders. Remittal of the matter to Dowsett J for further consideration of the review application was the preferred course because:

- Dowsett J was not engaged in a judicial review limited to error of law or process but, rather, a review that required consideration of the material before the Registrar and any other material that might be placed before him;
- therefore, remittal back to the Registrar (the order the appellants sought) was not appropriate—at [97] to [98].

Their Honours went on to note that:

> This does not prevent his Honour, in the exercise of his discretion under s 23 of the Federal Court Act, from remitting the matter to the Registrar with directions if he thinks it appropriate. Alternatively, his Honour may decide to direct the Registrar to register the claim. Alternatively, his Honour might come to the conclusion, on all of the materials that were before him or are to be before him, that the claim should not be accepted and so dismiss the review application—at [98].

Comment

Given the facts of this case, it is not clear what will be sufficient in each case. Their Honours did not appear to disagree with Dowsett J's analysis as to what the material provided as the factual basis to support the three assertions found in s. 190B(5) must address. Indeed, at [96], the court endorsed the view that one of the 'questions' that 'must be addressed' under s. 190B was whether the Registrar could be satisfied, upon the material provided, that there was, at first contact, an Indigenous society in the claim area observing identifiable laws and customs.

Further, it seems that while only a general description of the factual basis supporting the three particular assertions need be provided, the court envisioned that it would 'fully and comprehensively' address the matters raised by s. 62(2)(e) and opined that 'assertions at a

high level of generality' that do not provide 'sufficient detail to enable a genuine assessment of the application by the Registrar ' would not suffice. Again, this is not an easy standard to apply. For example, in this case, had Mr Hagen's report not been included as part of the application, would what was contained at Schedule F of the application (set out above) have been sufficient?

Timber Creek appeal - compulsory acquisition

Griffiths v Minister for Lands, Planning and Environment [2008] HCA 20 (High Court)

Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ, 15 May 2008

Issues

In this case, the High Court considered two main issues:

- the scope of the power to acquire land 'for any purpose whatsoever' found in s. 43(1) of the *Lands Acquisition Act* (NT) (LAA) e.g. did it empower an acquisition to enable the sale or lease of the area acquired for private use pursuant to s. 9 of the *Crown Lands Act* (NT)(CLA)?
- did s. 24MD of the *Native Title Act 1993* (Cwlth) (NTA) provide for the extinguishment of native title by compulsory acquisition where no other rights and interests, other than those of the Crown, existed in relation to the area concerned?

On the first issue, Chief Justice Gleeson and their Honours Justices Gummow, Hayne, Heydon and Crennan all found that the expression 'for any purpose whatsoever' in s. 43(1) of the LAA must, at least, include for the purpose of exercising the power conferred by s. 9 of the CLA. Their Honours Justices Kirby and Kiefel dissented. On the second, all seven judges were of the view that s. 24MD allowed for a compulsory acquisition that had the effect of extinguishing native title, even where the only interests existing in the area concerned (other than those of the Crown) are native title rights and interests, provided all of the conditions found in s. 24MD(2) are met. Therefore, the appeal was dismissed and the appellants were ordered to pay the Northern Territory's costs.

Background

This case concerned seven lots in the town of Timber Creek in the Northern Territory. All of the lots were 'Crown lands' as defined in s. 3 of the CLA, which provides that:

- Crown lands cannot be alienated otherwise than in accordance with the CLA;
- the minister, in the name of the territory, may grant an estate in fee simple or a lease of vacant Crown land—see ss. 5 and 9 of the CLA respectively.

A number of notices of proposed acquisition were issued over the seven lots in question. The purpose for which the land was being acquired (as identified in the notices) was, essentially, in order to grant term leases or freehold pursuant to s. 9 of the CLA for pastoral, agricultural or commercial use i.e. the land was being acquired to enable it to be leased or sold for private

use. At that time of the issue of the acquisition notices, there was no native title claim to the areas concerned.

The territory relied on s. 43(1) of the LAA, which empowers the responsible minister, subject to the LAA, to compulsorily acquire land 'for any purpose whatsoever'. The LAA provides that:

- 'land' includes an 'interest' which, in turn, includes 'native title rights and interests' as defined in s. 223 of the NTA;
- upon gazettal of a notice of acquisition, the 'land' acquired vests in the territory freed and discharged from all interests and restrictions of any kind;
- the statute applies in relation to an acquisition of an interest in land comprising native title rights and interests where the acquisition is a future act to which ss. 24MD(6A) or 24MD(6B) of the NTA apply— see ss. 4 and 5A(1) of the LAA.

Shortly after the issue of the acquisition notices, two claimant applications were filed on behalf of the Ngaliwurru and Nungali People over the lots subject to those notices. Both were 'protective responses' i.e. made (among others) for the purpose of securing future act rights under s. 24MD of the NTA in relation to the proposed acquisitions. Both claimant applications were subsequently registered on the Register of Native Title Claims. (A third claimant application was also made but it is not relevant to these proceedings.)

The minister, as required by the LAA pre-acquisition procedures, gave the registered native title claimants notice of the proposals to acquire all interests (including native title, if any) in relation to the lots in question. The claimants then lodged objections to the acquisitions pursuant to s. 34 of the LAA. The objections were heard by the territory's Lands and Mining Tribunal which recommended that the acquisitions take place, subject to conditions relating to compensation. The minister decided to act on that recommendation.

The registered native title claimants successfully applied to the territory's Supreme Court to have those decisions set aside. The minister then successfully appealed against that judgment – see *Griffiths v Lands and Mining Tribunal* (2003) 179 FLR 241; [2003] NTSC 86 and *Minister for Lands, Planning and Environment v Griffiths* (2004) 14 NTLR 188; (2004) 133 LGERA 203; [2004] NTCA 5, summarised in *Native Title Hot Spots* Issue 6 and Issue 10 respectively.

The claimants then applied for special leave to appeal to the High Court. On the initial hearing of that application, their Honours Justices Hayne and Callinan noted that the intersection between the LAA and the NTA was 'affected by' proceedings pending in the Federal Court (i.e. did native title exist in the areas subject to the purported acquisitions) and decided to 'await the fate' of the claimant applications—see *Griffiths v Minister for Lands, Planning and Environment* [2005] HCATrans 223.

Special leave to appeal was granted in June 2007, at which time the fact that the Ngaliwurru and Nungali People held native title (subject to the purported acquisitions) was no longer in dispute in the Federal Court proceedings – see *Griffiths v Minister for Lands, Planning &*

Environment [2007] HCATrans 320. For the transcript of the hearing of the appeal to the High Court, see *Griffiths v Minister for Lands, Planning & Environment* [2007] HCATrans 685.

The Federal Court later made a determination recognising the Ngaliwurru and Nungali People as native title holders. Appeal proceedings in relation to (among other things) the nature and extent of their native title rights and interests are not relevant to this case—see *Griffiths v Northern Territory (No. 2)* [2006] FCA 1155, summarised in *Native Title Hot Spots* Issue 21, and *Griffiths v Northern Territory* (2007) 243 ALR 7; [2007] FCAFC 178 summarised in *Native Title Hot Spots* Issue 27.

The question in this case was whether or not the Ngaliwurru and Nungali People's native title to the seven lots in question had been extinguished as a result of being acquired pursuant to s. 43(1) of the LAA.

Scope of the power under the LAA

The first issue raised by the appellants was the proper construction of s. 43(1)(b) of the LAA, which states that:

> Subject to this Act, the Minister may acquire land under this Act for any purpose whatsoever…if the pre-acquisition procedures in Parts IV and IVA as applicable have been complied with - by compulsory acquisition by causing a notice declaring land to be acquired to be published in the Gazette.

The appellants submitted that, notwithstanding the use of the phrase 'any purpose whatsoever', the minister was not empowered to acquire land from one person solely to enable it to be sold or leased by the territory for the private use of another person.

In a joint judgment, their Honours Justices Gummow, Hayne and Heydon examined the provenance of s. 43(1), noting (among other things) that:

- before self-government, acquisition of land in the territory was controlled by the *Lands Acquisition Act 1955* (Cwlth) (Cwlth LAA), which empowered the Commonwealth to acquire land 'for a public purpose', relevantly defined as 'any purpose in relation to' the territory;
- after the *Northern Territory (Self-Government) Act 1978* (Cwlth) commenced, the LAA was enacted;
- at that time, s. 43 provided that the minister 'may acquire land for public purposes' (subject to the LAA), defined as a purpose in relation to the territory;
- section 43 was amended in 1982 to simply state that 'the Minister may, under this Act [and subject to it] acquire land' i.e. the LAA was amended to remove any reference to 'public purpose';
- when the LAA was further, and extensively, amended in 1998 after the *Native Title Amendment Act 1998* (Cwlth) commenced, s. 43 was repealed and replaced with the version that was before the court in this case—at [23] to [27].

Their Honours noted that it was not merely the NTA that had 'supervened' between the 1982 amendments to the LAA and those made in 1998. There was also the High Court's decision in *Clunies-Ross v The Commonwealth* (1984) 155 CLR 193 where, in considering the power

conferred by s. 6 of the Cwlth LAA to 'acquire land for a public purpose', the High Court found that:

> The power did not extend to purposes "quite unconnected with any need for or future use of the land"…and did not extend to the taking of land merely in order to deprive the owner of the land and thereby advance or achieve some purpose in respect of which the Parliament had power to make laws—at [28].

In the light of this:

> [T]he absence from s 43 in its post-1998 form of any reference to "public purpose" and the presence of the expression "for any purpose whatsoever" may readily be understood as a removal by the Territory legislature of any ground for the limitation of the statutory power by reference to considerations which had prevailed in *Clunies-Ross*—at [29].

Cases relied upon by the appellants dealing with local government bodies were distinguished on the basis that the territory was, via the Legislative Assembly, empowered to make laws for the peace, order and good government of the territory and so:

> The statement…that municipal councils had not been empowered to interfere with the private title of A for the private benefit of B…is inapt to describe…the interrelation between the powers conferred by the LAA and the CLA—at [32], referring to *Werribee Council v Kerr* (1928) 42 CLR 1.

Nor was there anything to indicate that the territory was 'seeking to acquire the land in question for an ulterior purpose there would have been an ostensible but not a real exercise of the power granted by its statute'—at [33], referring to *Samrein Pty Ltd v Metropolitan Water Sewerage & Drainage Board* (1982) 56 ALJR 678.

In the event, their Honours did not need to determine any limits there may be to the scope of the power conferred by the 'broad words' of s. 43(1) because:

> [T]he expression "for any purpose whatsoever"…must at least include for the purpose of enabling the exercise of powers conferred upon the executive by another statute of the Territory…[including] the exercise of the power conferred by s 9 of the CLA—at [30].

Therefore, their Honours found that appeal on the ground of the construction of s. 43 of the LAA failed. Gleeson CJ and Crennan J agreed—at [1], [34] and [155].

Kirby and Kiefel JJ dissented on this point.

While Kirby J accepted that, if 'a purely literal approach' was taken, 'a conclusion favourable to the minister can be persuasively explained', his Honour was of the view that the notices were invalid, chiefly because:

- 'specific and unambiguous provisions' authorising 'private to private' acquisitions, such as those 'purportedly effected in this case', were required; and
- the 'general language' of s. 43(1) was ambiguous and did not support the acquisitions—at [56] to [57].

His Honour commented that:

> [A]gainst the background of the history of previous non-recognition [of native title]; the subsequent respect accorded to native title by this Court and by the Federal Parliament; and the incontestable importance of native title to the cultural and economic advancement of indigenous

> people in Australia, it is not unreasonable or legally unusual to expect that any deprivations and extinguishment of native title, so hard won, will not occur under legislation of any Australian legislature in the absence of provisions that are unambiguously clear and such as to demonstrate plainly that the law in question has been enacted by the lawmakers who have turned their particular attention to the type of deprivation and extinguishment that is propounded—at [105].

Kiefel J was of the view that the exercise of the power given by s. 43(1) was, in this case, invalid for (among others) the following reasons:

- the earlier use of the word 'public' in s. 43 did not qualify 'purpose' in 'any meaningful way, such that its removal…might imply the opposite';
- nothing in the LAA suggested it was 'intended to operate such that one person's interest in land might be taken in order that others might put it to some use agreed upon' by the minister;
- it was 'abundantly clear' in this case that no use by the minister or the territory was proposed, 'even in the most passive sense';
- in the absence of a 'governmental purpose', the exercise of the power 'stands as no more than a clearing of native title interests in order to effect leases and grants of the land for private purposes';
- the Lands and Mining Tribunal found that the proposed leases and grants of land had little economic or other significance to the region, no benefit to the native title holders and that there was 'little or no public benefit in the acquisition'—at [172], [174], [181] and [184].

Conditions governing extinguishment of native title via compulsory acquisition

Section 24MD of the NTA (part of the future act regime) allows for the extinguishment of native title via a valid future act that is the compulsory acquisition of native title rights and interests, subject to three conditions being met.

First, the acquisition must be done under a law (in this case) of the territory that permits the compulsory acquisition of both native title rights and interests and non-native title rights and interests in relation to the area concerned. The LAA was found to fulfil this condition—at [45] and see s. 24MD(2)(a).

Second:

> [T]he whole, or the equivalent part, of all non-native title rights and interests, in relation to the land or waters to which the native title rights and interests that are compulsorily acquired relate, is also acquired (whether compulsorily or by surrender, cancellation or resumption or otherwise) in connection with the compulsory acquisition of the native title rights and interests—s. 24MD(2)(b).

It was the proper construction of '*all* non-native title rights and interests' that was at issue in this case.

Third:

> [T]he practices and procedures adopted in acquiring the native title rights and interests are not such as to cause the native title holders any greater disadvantage than is caused to the holders of non-native title rights and interests when their rights and interests are acquired... in connection with the compulsory acquisition of the native title rights and interests—s. 24MD(2)(ba).

If these three conditions are met, then the future act (i.e. the acquisition) is valid, it extinguishes the whole or the part of the native title rights and interests acquired and compensation is payable—see ss. 24MD(1), 24MD(2)(c) to 24MD(2)(e).

Gummow, Hayne and Heydon JJ referred to the background to s. 24MD(2), noting (among other things) that, when the NTA was amended in 1998, future acts involving the compulsory acquisition of native title were included in the new Subdiv M. Comments made in Explanatory Memorandum to the Native Title Amendment Bill 1997 in relation to Subdiv M (which includes s. 24MD) were set out in their Honours' reasons, as were the following comments found in the Supplementary Explanatory Memorandum:

> This amendment to proposed subsection 24MD(2) makes it clear that when native title rights are subject to a non-discriminatory compulsory acquisition process, the non-native title rights in the area concerned, if any, must be acquired…through a compulsory acquisition or by surrender, cancellation, resumption, or otherwise.

Their Honours saw these 'Parliamentary materials' as indicating:

> [A] legislative proposal to proceed on the basis provided by the previous s 23, permitting future compulsory acquisition of native title rights, but also to ensure that where, as it now appeared to be feasible, native title rights subsisted concurrently with non-native title rights, any power of acquisition was exercised in a non-discriminatory fashion by acquiring and extinguishing both species of rights—at [43].

Gummow, Hayne and Heydon JJ noted (among other things) that:

- the 'critical provision' is s. 24MD(2), which provides that a compulsory acquisition will extinguish the whole or part of the relevant native title rights and interests;
- the 'critical condition' for the operation of the extinguishment permitted by s. 24MD(2)(c) is s. 24MD(2)(b);
- the appellants argued that the word 'all' in that subsection required 'the presence of at least some non-native title rights' but the word 'all' has 'various meanings and shades of meaning';
- the court's task was to give effect to Parliament's purpose, controversial provisions should be read in the context of the NTA as a whole and the NTA as a whole should be read in the historical context that led to its enactment—at [45] to [48].

Their Honours were of the view that it would be an 'odd construction' which read s. 24MD(2)(b) as:

> [D]enying, contrary to what had been the case under the previous s 23(3), the possibility of compulsory acquisition where all that existed for that acquisition were native title rights and interests'—at [49].

It was found that:

> The better construction of the paragraph treats "all" as identifying such non-native title rights and interests as may exist in relation to the land or waters in question. Put shortly, "all" may be read as "any"—at [49].

Given this finding, Gummow, Hayne and Heydon JJ held that the appeal on the issue of the proper construction of s. 24MD(2)(b) failed—at [51].

In agreeing, Gleeson CJ commented (among other things) that:

- making the presence or absence of a non-native title right or interest determinative of the application of s. 24MD(2)(b) did not advance the legislative purpose, which was 'against…discriminatory acquisition';
- adopting the appellants' construction appeared to produce 'a curious, in fact inexplicable, new form of discrimination' i.e. native title rights and interests that co-exist with non-native title rights could be extinguished by acquisition whereas those that did not, could not;
- paragraphs 24MD(2)(a), (b) and (ba) are all directed to 'whether, in the compulsory acquisition of native title rights and interests, there is equality of treatment between native title and non-native title rights and interests';
- that question could be answered by 'postulating the existence of non-native title rights and interests and asking how they would be affected' and did not require 'the identification of actual rights or interests and demonstration of how they are affected'—at [5] and [7].

Kirby J acknowledged 'the force of the construction argument offered' by Gleeson CJ and Gummow, Hayne and Heydon JJ in relation to s. 24MD(2)(b) and so was 'not inclined to disagree with' their resolution of that issue. Crennan and Kiefel JJ agreed that the appeal on this ground failed—at [76], [155] and [156].

Decision

As the appellants failed on all grounds, the appeal was dismissed and they were ordered to pay the territory's costs.

Blue Mud Bay – Fisheries Act and ALR Act

Northern Territory v Arnhem Land Aboriginal Land Trust [2008] HCA 29 (High Court)

Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ, 30 July 2008

Issues

The issues arising in this case were whether:

- the *Fisheries Act 1988* (NT) (Fisheries Act) provides that a person acting in accordance with that Act may enter and fish in waters that lie within the boundaries of a grant in fee simple under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cwlth) (ALR Act);
- whether the Fisheries Act, or a licence granted under it, authorised entry to any particular area.

By a majority of 5 to 2, the High Court found that the Fisheries Act did not, without more, permit entry into the tidal waters within the boundaries of a grant under the ALR Act and that permission from the relevant land council under the Aboriginal Land Act (NT) (ALA) was required. (Their Honours Justices Heydon and Kiefel dissented.)

Comment – decision has no effect on native title law
This decision only applies to areas within the boundaries of grants of an estate in fee simple made under the ALR Act in the Northern Territory. It does not disturb the principle established by the High Court in *Commonwealth v Yarmirr* (2001) 208 CLR 1 that 'exclusive' native title cannot exist seaward of the high water mark and so there can be no native title right to control access to, or the use of, that area.

Background
This was an appeal against aspects of the judgment in *Gumana v Northern Territory* (2007) 158 FCR 349; [2007] FCAFC 23, summarised in *Native Title Hot Spots* Issue 24.

The Yolngu People are, under the ALR Act, the traditional owners of parts of north-east Arnhem land. In 1980, two grants were made to the Arnhem Land Aboriginal Land Trust (the Land Trust), as representing the Yolngu, pursuant to the ALR Act (the ALR Act grants). The 'mainland grant' covers approximately 90,000km^2 (which included Blue Mud Bay). The Arnhem Land islands grant consists of all the islands (except Groote Eylandt) adjacent to area subject to the mainland grant. Under the ALR Act, the Land Trust must exercise its powers as owner of the land 'for the benefit of the Aboriginals concerned' and in accordance with the directions of the Northern Land Council (NLC).

Each ALR Act grant extended to the low water mark and included areas bounded by straight lines joining the seaward extremities of the banks of rivers, streams and estuaries that intersected the coast i.e. the grants included the intertidal zone and rivers and estuaries affected by the ebb and flow of the tides.

Subsection 70(1) of the ALR Act provides that '[a] person shall not enter or remain on Aboriginal land' and prescribes a penalty for doing so. 'Aboriginal land' is defined in the ALR Act to mean (relevantly) 'land held by a Land Trust for an estate in fee simple'.

A defence exists under s. 70 if a person enters or remains on Aboriginal land 'in performing functions under' the ALR Act or 'otherwise in accordance with' the ALR Act 'or a law of the Northern Territory'. The ALA is one such 'law of the Northern Territory'. Under the ALA, the relevant land council (NLC in this case) may grant permission to 'enter and remain' on 'Aboriginal land'. The Legislative Assembly of the territory was given the power to enact the ALA by s. 73(1) of the ALR Act.

Since the late 1990s, the NLC (on behalf of the traditional owners) had been in dispute with the territory over the effect of s. 70 of the ALR Act. The NLC maintained that the territory's Director of Fisheries could not authorise fishing in waters overlying Aboriginal land. The director maintained that tidal waters ebbing and flowing over Aboriginal land were not part of the Aboriginal land and so fishing licences could validly authorise fishing in those waters. This dispute led to proceedings being brought in the Federal Court.

One proceeding was a claimant application filed on behalf of members of the Yolngu People. They were subsequently recognised as holding native title to the area the subject to the

mainland grant—see *Gumana v Northern Territory* (2005) 141 FCR 457; [2005] FCA 50, *Gawirrin Gumana v Northern Territory of Australia (No 2)* [2005] FCA 1425 and *Gumana v Northern Territory* (2007) 158 FCR 349; [2007] FCAFC 23, summarised in *Native Title Hot Spots* Issue 14, Issue 16 and Issue 24 respectively.

The other proceeding filed related to the interaction of the ALR Act and the Fisheries Act. It is the findings of the Full Court of the Federal Court in relation to that proceeding which gave rise to the appeal to the High Court.

At first instance, it was found that an ALR Act grant did not confer a right to exclude fishing in the intertidal zone. On appeal, the Full Court overturned that finding and declared that the Fisheries Act:

- had no application in relation to areas within the boundary lines described in the ALR Act grants;
- did not confer on the Director of Fisheries a power to grant a licence under that Act that would authorise or permit the licence holder to enter and take fish or aquatic life from areas subject to the ALR Act grants;
- was invalid and of no effect in so far as it purported to operate with respect to areas subject to the ALR Act grants.

The territory was granted special leave to appeal against the judgment on the Fisheries Act in June 2007. The appeal was heard in December 2007. By the time the oral hearing of the appeal had finished, it was accepted that all three of the Full Court's declarations should be set aside as they were 'too wide'—at [15] to [16].

Wrong premise – common law right to fish abrogated

In a joint judgment, Chief Justice Gleeson and their Honours Justices Gummow, Hayne, and Crennan began by noting that:

> Much of the argument in the appeal to this Court, and in the courts below, proceeded from the premise that there is a common law public right to fish in tidal waters and that …how that right does or does not intersect with the rights given by the grants under the [ALR]…Act [was the relevant question]. These reasons will show that this premise is wrong—at [19].

Their Honours canvassed the law on point, noting a common law right to fish in the sea and tidal navigable waters was accepted in Australia at sovereignty but, because it was a public rather than a proprietary right, it so could be abrogated or regulated by a competent legislature—at [22], referring to *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314 at 330.

It was found that, by necessary implication, the Fisheries Act abrogated any public right to fish in tidal waters that existed before it was enacted—at [27].

According to their Honours:

> It is the statutory exclusion provided by s 10(2), in favour of fishing for subsistence or personal use only, to which a person fishing in tidal waters may look for exemption from the otherwise general prohibition of s 10(1) against fishing except "under and in accordance with a licence" issued under the Act. And a person may rely upon that exemption only "within such limits (if any)" relating to the matters identified in s 10(2) as may be prescribed for any such fish or aquatic life. But whether

and how a person may take fish or aquatic life in the Northern Territory are questions to be answered by resort to the Act—at [28].

Therefore, what had to be resolved in this case was whether or not there was any 'competition' between rights derived from the Fisheries Act and the rights of the Land Trust under the ALR Act grants. Rather, the relevant questions were:

- whether the Fisheries Act, or a licence granted under it, authorised entry to any particular area
- whether 'the Fisheries Act seeks to provide that a person who acts in accordance with that Act may enter and fish in waters that lie within the boundaries of the [ALR Act] grants'—at [30] to [31].

The Fisheries Act does not authorise entry

Their Honours considered four sections of the Fisheries Act:

- section 11, which provides for licences to issue subject to conditions e.g. restricting the 'fisheries region' or the 'area of operation' of the licence and stating that nothing in the licence diminished the licence holder's responsibility to obtain 'any necessary approvals from land owners to transit through, or operate the licence within' the stipulated area of its operation;
- section 22, which deals with fisheries management plans that may regulate fishing in a managed fishery;
- section 53, which provides that nothing in, or done under, the Fisheries Act limits the rights of Aboriginal people to continue to use resources of an area in their traditional manner, subject to certain restrictions;
- section 55, which deals with aquaculture leases of Crown land and provides that the grant of such a lease do not, of itself, give the lease holder a right to prevent people from passing over the surface of any water but that conditions attached to an associated aquaculture licence may allow passage through the area covered by the lease (or part of it) to be restricted or prohibited.

It was concluded that:

- apart from ss. 11, 22, 53 and 55, the Fisheries Act does not deal with *where* persons *may* fish but, rather, provided for where persons *may not* fish;
- nothing in the Fisheries Act authorised persons (whether as licence holders or otherwise) to 'enter any particular place or area for the purpose of fishing'—at [33] and [36].

Their Honours noted that the Full Court had treated the Fisheries Act as 'doing no more' than regulating the exercise of a public right to fish or to navigate in the intertidal zone or tidal waters. However:

> Once it is recognised not only that the common law right to fish in tidal waters has been abrogated by the Fisheries Act, but also that a licence under the Fisheries Act gives no authority to enter any identified area, it is apparent that the debate in the courts below about the "application" of the Fisheries Act proceeded from incorrect premises—at [39].

Public right of navigation not relevant to the issue of statutory construction

It was noted that:

- the common law public right 'to pass and repass, and to remain for a reasonable time…in tidal waters for all purposes of navigation, trade and intercourse' was used in argument to explain how a person might enter the intertidal zone or tidal waters by sea without traversing Aboriginal land 'and then exercise what was said to be either a common law public right to fish' or a right given by a Fisheries Act licence;
- no party suggested that the public right to navigate extended to taking fish or other aquatic life in the intertidal zone or the tidal waters that were within the boundaries of the ALR Act grants;
- what was in issue was whether a person holding a Fisheries Act licence was permitted to fish in the intertidal zone or in tidal waters 'within the boundaries' of the ALR Act grants, an activity that 'goes beyond the exercise of any right of navigation';
- in any case, common law rights of navigation were, like the right to fish, 'susceptible to legislative abrogation';
- once it was recognised that 'the essential question' concerned 'the proper construction and application' of s. 70(1) of the ALR Act, 'rather than any question of competition between the rights of a landholder and public rights', reference to public rights of navigation 'provide no assistance to the task of statutory construction'—at [40] and [60].

Comment on right to navigate

While it wasn't necessary for their Honours to make a finding on point, given the relevant question as they formulated it, the common law right to navigate appears to have been abrogated to the extent that it is inconsistent with s. 70 of the ALR Act—at [43] to [44].

Did the ALR Act grants allow Land Trust to exclude Fisheries Act licence holders?

Their Honours then turned to the relevant question, which was whether or not the ALR Act, and the grants made under it, allowed the Land Trust to exclude a person holding a licence under the Fisheries Act from the waters lying within the boundaries of the grants. The answer to that question turned upon the proper construction of s. 70 of the ALR Act and the expression 'Aboriginal land' in that context—at [41].

The ALR Act grants in question were both described in Schedule 1 of the ALR Act by a 'metes and bounds' description which is:

> A description in words, starting from some identifiable datum point, of the external dimensions of the boundary of a portion of land as a continuous line from and to the point of commencement—Online Encyclopaedic Australian Legal Dictionary, Lexis Nexis.

As noted earlier, s. 70(1) of the ALR Act provides that a person 'shall not enter or remain on Aboriginal land' unless they do so 'in performing functions under' the ALR Act or 'otherwise in accordance with' the ALR Act 'or a law of the Northern Territory'.

It was found that:

- the areas subject of the ALR Act grants were defined by metes and bounds which, for the sea boundaries, were fixed as a relevant 'low water mark' i.e. the ALR Act expressly

provided for the grant of interests in fee simple over areas that included areas that would be covered by tidal waters;
- by defining the areas granted by reference to low water mark, the ALR Act grants 'gave effect to the expressly intended operation' of the ALR Act;
- the description of the interest granted as 'an estate of fee simple' was to be understood 'as giving due weight to a number of other provisions' of the ALR Act, including reservations in relation to minerals and mineral exploration, the exclusion of certain roads, the capacity to have the grant registered under the Torrens title system 'according to its tenor' and restrictions on alienation of the land;
- the 'evident purpose' of the restrictions on alienation was to 'confine the classes of persons to whom, and the circumstances in which, the land might be alienated' i.e. subject to some exceptions, an estate or interest for a term that exceeded 40 years could not be granted without the written consent of the relevant minister, the written direction of the Northern Land Council and, importantly, the consent of traditional owners—at [46] to [49].

Their Honours went on to find that, despite the fact that an ALR Act grant 'differed in some important ways' from interests 'ordinarily recorded' under the Torrens system as an estate in fee simple:

> [I]t must be understood as granting rights of ownership that "for almost all practical purposes, [are] the equivalent of full ownership"…In particular, subject to any relevant common law qualification of the right…, or statutory provision to the contrary, it is a grant of rights that include the right to exclude others from entering the area identified in the grant—at [50].

No distinction between when the tide is in and when it is out

The submission that the ALR Act grants were 'limited to rights over the solid surface of the earth, and gave no rights in respect of the superjacent waters' was rejected—at [51].

In the course of so doing, three 'uncontroversial propositions' were first noted:
- the 'immediate question to be decided' was 'whether entering or remaining within the intertidal areas, when those areas are covered by water, is to enter or remain on Aboriginal land', which was 'a question about the proper construction' of s. 70(1) of the ALR Act;
- the ALR Act frequently referred to 'land' and that was 'ordinarily understood as referring to a solid portion of the earth's surface';
- it was not to be 'supposed' that the grants to the Land Trust gave 'a proprietary interest to the grantee in respect of any particular column of water that might overlie the intertidal zone'—at [52].

Their Honours were careful to point out that:

> Because the immediate question in the present matter depends upon the proper construction and application of s 70(1) of the…[ALR] Act, it is neither necessary nor productive to attempt to define exhaustively the nature or extent of the rights conferred by the grants over the intertidal zones when they are covered by water. In particular, the question of statutory construction is not answered directly by identifying what rights are conferred by the grants or by asking whether a grant of an estate in fee simple, made under the [ALR]…Act, should be understood as subject to a common law right to fish or a common law right of navigation.

> The references made in argument to a distinction between the dry land and land covered by water are therefore to be understood as arguments directed to the proper construction of either the reference to "Aboriginal land" in s 70(1) or, perhaps, the reference in that provision to "enter or remain". That is, the distinction that was drawn sought to limit the application of s 70(1) to conduct involving direct contact with the solid surface of the earth—at [53] to [54].

It was found that:

> The asserted distinction between dry land and the land in the intertidal zone when covered by water should not be drawn. The Aboriginal land which is the subject of the grants now in issue is defined by metes and bounds. To define the land in that way requires that s 70(1) is given effect, according to its terms, by reference to those metes and bounds and without regard to whether the tide is in or out at the time of an alleged entry or remaining. Nothing in the Land Rights Act requires a different conclusion—at [55].

***Risk* distinguished**

In *Risk v Northern Territory* (2002) 210 CLR 392; [2002] HCA 23 (*Risk*), it was found that, for the purposes of s. 3(1) of the ALR Act, 'land in the Northern Territory' does not include the seabed of waters below low water mark of bays within the limits of the territory. Reference was made to s. 73(1)(d) of the ALR Act (which is Commonwealth legislation), which provides for the legislative assembly of the territory to make laws:

> [R]egulating or prohibiting the entry of persons into, or controlling fishing or other activities in, waters of the sea, including waters of the territorial sea of Australia, adjoining, and within 2 kilometres of, Aboriginal land, but so that any such laws shall provide for the right of Aboriginals to enter, and use the resources of, those waters in accordance with Aboriginal tradition.

Part III of the ALA, which deals with the control of entry onto seas adjoining 'Aboriginal land' (as defined in the ALR Act), is such a law.

Gleeson CJ, Gummow, Hayne and Crennan JJ were of the view that:

> [P]rovision of power to pass legislation [such as the ALA] prescribing a two kilometre buffer zone of sea adjoining the boundary of Aboriginal land makes evident sense if the boundary of Aboriginal land is fixed at low water mark, as it is in the grants now under consideration, and if the prohibition on entering and remaining on Aboriginal land is engaged whether or not the intertidal area is covered with water. But if that prohibition operates only when and to the extent that the intertidal zone can be entered on foot, the provision for enactment of legislation providing a buffer zone would necessarily operate in a very odd way—at [57].

Their Honours were of the view that:

- what was said in *Risk* neither required nor supported the conclusion that the phrase 'Aboriginal land' in s. 70(1) should be 'understood as confined, in intertidal zones, to only the land surface of that area';
- the ability to create a buffer zone pursuant to s. 73(1)(d) supported the view that 'Aboriginal land' should be understood as 'extending to so much of the fluid (water or atmosphere) as may lie above the land surface within the boundaries of the grant and is ordinarily capable of use by an owner of land'—at [58].

Decision

Gleeson CJ, Gummow, Hayne and Crennan JJ concluded that:

- subsection 70(1) could be engaged if a person holding a licence under the Fisheries Act entered or remained on waters within the boundaries of the ALR Act grants;
- whether this was so turned on whether they did so 'in accordance with' the ALR Act (a Commonwealth law) or 'a law of the Northern Territory';
- holding a licence under the Fisheries Act was not within that qualification;
- under the ALA, permission could be given by the NLC (in this case) to enter and remain upon Aboriginal land;
- the exercise of permission granted by the NLC pursuant to the ALA would be to enter or remain on the land in accordance with 'a law of' the territory i.e. the ALA;
- because the declarations made by the Full Court were framed too widely, the appeal should be allowed in part—at [61] to [62].

Their Honours decided that there should be a declaration that:

> Sections 10 and 11 of the *Fisheries Act*…do not confer on the Director of Fisheries…a power to grant a licence under that Act which licence would, without more, authorise or permit the holder to enter and take fish or aquatic life from areas within the boundary lines described in the Arnhem Land (Mainland) Grant and the Arnhem Land (Islands) Grant made under the...[ALR Act]—at [62].

As it was a condition of the grant of special leave to appeal that they undertake to do so, the appellants were ordered to pay the respondents' costs of the appeal.

Kirby J agreed that these were the appropriate orders and generally agreed with the reasoning in the joint reasons for judgment, noting that:

> The conclusion expressed in the joint reasons is reinforced…by adopting the approach to the definition, enlargement or diminution of native title rights that I sought to explain [in dissent] in *Griffiths v Minister for Lands, Planning and Environment*…That approach finds support in judicial decisions upon analogous problems of statutory construction adopted by courts of high authority in other common law jurisdictions, called upon to declare the ambit of the legal rights to the traditional interests of indigenous peoples living in societies settled during colonial times—at [67], referring to *Griffiths v Minister for Lands, Planning and Environment* [2008] HCA 20, summarised in this issue of *Native Title Hot Spots*.

The dissenting judgments

His Honour Justice Heydon would have allowed the appeal for (among others) the following reasons:

- only the soil of the intertidal zone was 'Aboriginal land' pursuant to s. 70;
- the ordinary meaning of 'land' was the solid portion of the earth's surface and it did not include waters flooding over it and ebbing from it with the tides;
- the ALR Act contained no indication that 'land' should bear a different meaning and, in fact, contained some provisions that positively supported the use of 'land' in the ordinary sense, including s. 73(1)—at [102] to [103].

Her Honour Justice Kiefel would also have allowed the appeal. After a lengthy discussion of the issues, Kiefel J concluded (among other things) that:

- the ALR Act does not provide for the control of entry onto intertidal waters or activities such as fishing by the Land Trust;
- the ALR Act does provide the foundation for a further statutory regime (i.e. 'Northern Territory laws'), that may prohibit or regulate those activities and Part III of the ALA is such a law;
- absent a 'sea closure' effected pursuant to s. 12 of the ALA, it was 'not unlawful for persons, otherwise entitled to take fish, to fish' in the intertidal waters of the ALR Act grants;
- a person taking fish in compliance with the terms of the Fisheries Act, or a licence issued under it, was entitled to do so in the intertidal zones in question in the absence of 'an exclusion' (i.e. a sea closure) under Part III of the ALA– at [160] to [161].

Kiefel J would have disposed of the appeal by, among other things, making declarations to the effect that the Land Trust does not have the power to exclude persons from fishing in intertidal zones of the ALR Act grants and that the power to do so was contained in Part III of the ALA—at [162].

Determination of native title - Birriliburu People

Patch v Western Australia [2008] FCA 944

French J, 20 June 2008

Issue

The issue before the Federal Court was whether to make a determination recognising the existence of native title under the *Native Title Act 1993* (Cwlth) (NTA) in relation to the majority of the area covered by the Birriliburu People's claimant application. It was decided that the determination should be made in accordance with s. 87A.

Background

The Birriliburu People's application, made in relation to approximately 66,700 km^2 of the Western Desert in Western Australia, was lodged in September 1998. It was accepted for registration in September 1999 and referred to the National Native Title Tribunal for mediation by the court in July 2000.

The applicant and the State of Western Australia (the only parties to the application) agreed on the terms of the consent determination in relation to more that 99 per cent of the area covered by the application. As to the balance, it was agreed the application should remain on foot and be adjourned because a new claimant application had been filed over that area asserting that s. 47B applies and mediation in relation to that area is ongoing.

Several areas where it was agreed native title had been extinguished by previous exclusive possession acts (as defined in s. 23B of the NTA) were excluded from the determination area because they were not included in the area covered by the application—see Schedule 2 of the determination.

Power of the court

The court accepted the parties' submission that, in circumstances where it is technically possible to make a consent determination under either ss. 87 or 87A (as in this case), it was preferable for the determination to be made under s. 87A. This was because the balance of the application would be deemed to be amended to remove the areas covered by the determination, it would be exempt from the reapplication of the registration test and the entry on the Register of Native Title Claims in relation to the application would be updated to reflect the amendment—at [7] and see ss. 64(1B), 190(3)(a) and 190A(1A).

Description of native title holders – application v determination

The description of the native title holders in the proposed consent determination was not identical to the description of the native title claim group in the application. The court accepted the parties' contentions that:

- the court could proceed to make a determination in such form as it saw fit, based on the evidence, so long as the application was 'valid';
- the court was not limited to making a determination in the form sought in the application;
- in circumstances in which the group of proposed native title holders was, in substance, the same group as the native title claim group, an amendment to the application was unnecessary—at [17] to [18].

Comment – ss. 47A(3) & 47B(3)

While it appears to be of no relevance in this case because there was no difference 'in substance', there may be cases where the description of the native title claim group in the application would need to be amended to match the description of the native title holders in the determination in order to ensure the effect of the determination is as described in ss. 47A(3) or 47B(3). This is because the chapeau to both ss. 47A(3) and 47B(3) states that: 'If the determination on the application is that the *native title claim group* [i.e. as described in the application] hold the native title rights and interests claimed', then the effect of determination recognising native title is as prescribed in ss. 47A(3) and 47B(3) e.g. the non-extinguishment principle applies to the creation of certain prior interests.

Appropriateness of proposed determination

French J commented that:

> The appropriateness of the proposed determination does not require that the Court undertake an inquiry into the merits of the claim made in the application. The State, which has its own competent and well-resourced legal representation, is satisfied as to the cogency of the evidence upon which the applicants rely…
>
> The connection report was assessed by…the Office of Native Title [ONT]…during the period September 2006 to May 2007…[which] conducted a preliminary internal review…, engaged an independent expert anthropologist to assess the material and obtained legal advice on the merits of the application…[ONT] was satisfied that the information contained in the connection material met its guidelines and on that basis the Deputy Premier accepted the…recommendation of the…[ONT] that the State should enter into negotiations toward an agreed determination of native title—at [13] to [14].

The court then briefly referred to the matters set out in the parties' joint submission, noting (among other things) that:

- the native title holders were said to be members of the broader Western Desert cultural bloc, which was the relevant 'society' for the purposes of the determination;
- Birriliburu, the soak after which the application was named, was 'mix-up country' where the three Western Desert dialects associated with the area overlapped;
- most of the claimants resided close to, but not inside, the determination area;
- together with people from other parts of the Western Desert, they describe themselves as Martu;
- while some claimants were recognised as native title holders in neighbouring Western Desert areas, the parties agreed they are an identifiable subset of the wider Western Desert society, being members of 17 family groups and other individuals recognised as custodians with rights and responsibilities in relation to the determination area in accordance with Western Desert laws and customs;
- it was common ground that, although the applicants did not live on the determination area, they continued to assert their rights, and carried out their responsibilities, in accordance with their laws and customs—at [16] to [17] and [23].

The material before the court showed (among other things) that:

- the *Tjukurrpa* (the dreaming or the law), which was the source of traditional laws and traditional customs to which the members of the native title holding group adhered, governed their religious practices, social rules, system of land tenure and other aspects of their life;
- the association of individuals and groups with particular areas of country came about through a variety of mechanisms, including conception, birth, growing up or initiation on the country, acquisition of knowledge through long residence or descent from a person who has had such a connection;
- landholding groups are not patrilineally-patrilocally structured;
- rather, members of the land holding groups were landholders through their shared association with, and to, the land;
- the land holding groups were open and inclusive so people had potential access to a number of areas;
- as a result of European settlement, and the subsequent movement away from the determination area, group membership and rights were asserted primarily through descent from a parent or grandparents associated with the country and there are now more fixed family group associations with country;
- the parties agreed that the narrowing of pathways to group membership and rights in land did not represent an interruption in the acknowledgment and observance of traditional laws and traditional customs and that descent remained the means by which people acquired rights—at [19] to [22].

Decision

The court, being satisfied that the procedural and substantive requirements of s. 87A had been met (i.e. that the proposed determination was both within power and appropriate), made a determination in the terms proposed by the parties—at [9] to [12] and [24].

Determination— s. 225
The determination recognised the existence of native title in the determination area. The native title holders are the Birriliburu People descended from certain named ancestors and persons generally acknowledged by them as having rights in part, or all, of the determination area through kinship, marriage, conception, birth, high ritual knowledge or responsibility for sites, including certain named persons.

The nature and extent of native title in the determination area is the right to possession, occupation, use and enjoyment to the exclusion of all others except in relation to flowing and subterranean water. The native title right to take flowing and subterranean water is a non-exclusive right for personal, domestic, or non-commercial communal purposes.

Section 47A applies to two reserves and one general purpose lease for the 'use and benefit of Aboriginal inhabitants'. Section 47B applies in relation to areas formerly subject to a reserve for the purpose of camping, several pastoral leases and two exploration permits. (Note there seems to be a typographical error in [2] of Schedule 4 of the determination i.e. given the context, all of the references there should be to s. 47B.)

Other rights and interests recognised in relation to the determination area include:
- those held under several mining and petroleum tenements;
- any existing public access to, and enjoyment of, waterways, beds and banks or foreshores of waterways, and stock routes including the Canning Stock Route;
- the rights and interests of Telstra Corporation Limited.

Prescribed body corporate
Within six months of the date of the determination, the native title holders must nominate a prescribed body corporate. There will then be a determination that the nominated prescribed body corporate is to hold the native title rights and interests the subject of the determination in trust for the common law holders in accordance with s. 56(2)(b) without the need for a further order. If no nomination is made within the period specified, or any further period the court may order, the matter is to be listed for further directions.

Interlocutory injunction – Rubibi

Sebastian v Western Australia [2008] FCA 926

Gilmore J, 19 June 2008

Issue
The issue before the Federal Court was whether to make orders to restrain the making of future act agreements over areas where native title had been found to exist. The 'core submission' made by those applying for injunctive relief (the Walman Yawuru) was that the registered native title claimant (the Rubibi applicant) had no authority to negotiate with the State of Western Australia in relation to those future acts. The application was dismissed pursuant to. 31A of the *Federal Court of Australia Act 1976* (Cwlth) (FCA) because there were

no 'arguable serious issues to be tried' and so no reasonable prospect of success. There was no order as to costs.

Background
Injunctive relief was sought on behalf of the Walman Yawuru, a group that had unsuccessfully opposed the making of a determination recognising the communal native title of the Yawuru community over areas in and around Broome. The substantive proceeding to which this application relates is a claimant application made pursuant to s. 13(1) of the *Native Title Act 1993* (Cwlth) (NTA) on behalf of the Yawuru community by the Rubibi applicant.

The determination recognising the Yawuru community's native title is not yet effective because no prescribed body corporate (PBC) has been determined. As a result, the details of the Yawuru community's claimant application are still on the Register of Native Title Claims.

The Rubibi applicant (acting as the 'registered native title claimant') has, since the finding that the Yawuru community holds native title, been negotiating with the state to reach a 'global agreement' to settle native title and heritage issues in relation to specific future developments in Broome. The Walman Yawuru, who were recognised as part of the native title holding community, but not as holding native title to their clan area on that basis, decided not to participate in the negotiations pending resolution of their appeal against that finding (among other things). They were unsuccessful on appeal—for further background, see *Western Australia v Sebastian* [2008] FCAFC 65, summarised in *Native Title Hot Spots* Issue 27.

Despite the dismissal of the appeal, and an invitation to participate in the negotiations, the Walman Yawuru maintained that the Rubibi applicant did not represent them and that they wished to be independently represented.

In support of the application for injunctive relief, it was submitted (among other things) that:
- the actions taken by the state and the Kimberley Land Council (the KLC, representing the Rubibi applicant in the negotiations) effectively denied the Walman Yawuru the option of taking any action to protect specific sites of significance to them;
- the state and the KLC had entered into a formal agreement under which the KLC is recognised as the sole authority to enter into negotiations on behalf of the traditional owners of Broome over potential processing sites to service the Brown Basin gas field—at [17] to [20].

Was the court *functus officio*?
The Rubibi applicant, in seeking to have the Walman Yawuru's application dismissed, submitted (among other things) that:
- the court was *functus officio* because final orders had been made in the substantive proceedings (i.e. the claimant application made on behalf of the Yawuru community had been heard and determined), apart from the exercise of liberty to apply in respect of the PBC determination and the inclusion of maps of the determination area;

- liberty to apply did not extend so far as to allow the making of the application for injunctive relief.

In the event, it was not necessary to decide this question because the Walman Yawuru's representative conceded that, if the two main issues discussed below were resolved against them (which they were), their application should be dismissed. Therefore, his Honour Justice Gilmour assumed (without deciding) that the court had jurisdiction to entertain the Walman Yawuru's application—at [28].

However, his Honour was not persuaded that it was 'necessarily the case' that the court was *functus officio* because (among other things):

- the court had ancillary powers flowing from ss. 22 and 23 of the FCA to resolve the whole of the controversy between the parties and so had power to make supplemental orders;
- while the exercise of this jurisdiction required caution, it was not limited to making of orders in aid of the enforcement and 'working out' of original orders—at [23] to [28].

First issue – native title party

The first issue was whether the Rubibi applicant had ceased to be a 'native title party' for the purposes of s. 30(2) of the NTA, which provides that: 'A person ceases to be a native title party if the person ceases to be a registered native title claimant'. The question before the court was not one of statutory construction but whether, on the facts, the provision applied.

It was accepted that procedural rights in relation to future acts accrue to a 'registered native title claimant', as defined in s. 253 of the NTA i.e.

> [P]ersons whose…names appear in an entry on the Register of Native Title Claims as the applicant in relation to a claim to hold native title in relation to the land and waters.

A 'registered native title claimant' is (among other things) a 'native title party' in right to negotiate proceedings – see ss. 29(2) and 30(1) of the NTA. The names of all of the people comprising the Rubibi applicant still appear on the Register of Native Title Claims in relation to the whole of the relevant area. However, the Walman Yawuru submitted that the Rubibi applicant had ceased to be a native title party because of the note to s. 30(2), which provides that:

> If a native title claim is successful, the registered native title claimant will be succeeded as a native title party by the registered native title body corporate.

His Honour observed that the NTA clearly contemplated the removal of the registered native title claimant from the Register of Native Title Claims once an 'effective determination' was made. However, in this case:

> [T]o the extent that it was determined that native title existed, the determination was to take effect immediately upon the making of a determination [of a PBC] under s 56(1) or s 57(2) of the Act…No determination has been made under either of those provisions of the Act. Accordingly the determination of native title has not yet taken effect—at [38].

The court accepted that the order was made in these terms to address:

> [A] perceived hiatus in the Act whereby, once a native title determination had been made and taken effect over an area of land, …the Native Title Register would…be amended to remove the

> entry pursuant to s 190(4)(d)…if the application was finalised. Early determinations became effective immediately with respect to areas where native title had been extinguished, as well as areas where native title existed, but allowed a period of time for nomination of a prescribed body corporate…In such a case, there was an hiatus period between removal of the entry from the Register of Native Title Claims and thereby removal of the details of the registered native title claimant and the entry onto the National Native Title Register of the PBC…Arguably, in this period there was no native title party…to notify or to negotiate with for the purposes of Part 2 Division 3 of the Act—at [40].

The court noted that s. 190 was amended by s. 100 of the *Native Title Amendment (Technical Amendments) Act 2007* so that s. 190(4)(d) now addresses this issue and that:

> [I]n the period between the making of a native title determination and the making of a PBC determination or nomination, the Register of Native Title Claims will make the situation clear to ensure that procedural rights are only accorded to the registered native title claimants over areas where native title has been found to exist—at [43].

After noting these amendments, it was found that the Rubibi applicant was:

- the 'registered native title claimant' as a matter of fact (because the determination of native title in this case was yet to take effect);
- the 'native title party' for the purpose of exercising the right to negotiate under the NTA—at [44].

Therefore, the submission that the Rubibi applicant had ceased to be a native title party failed—at [45].

Second issue – authorisation

The Walman Yawuru submitted that, even if the Rubibi applicant was empowered to exercise procedural rights in relation to future acts, the Walman Yawuru people had not authorised the Rubibi applicant to make the substantive application as required by s. 61(1). The court noted (among other things) that:

- no application to replace the Rubibi applicant had been made pursuant to s. 66B at any time during the proceedings;
- both the native title claim group description and the description of the native title holders in the determination of native title included a list of apical ancestors;
- the first two apical ancestors on both of those lists were identified in oral submissions made on behalf of the Walman Yawuru as their apical ancestors;
- therefore, the native title claim group included the Walman Yawuru people;
- no challenge concerning authorisation had been made earlier in the proceeding, the claim was now finalised (but for the nomination of the PBC) and final orders had been made—at [50].

In these circumstances, his Honour found that the submission on lack of authorisation failed:

> [T]he Walman Yawuru cannot now raise the question of the lack of authorisation of the Rubibi applicant…In its negotiations with the State the Rubibi applicant represents the Yawuru Community which includes the Walman Yawuru people—at [50].

Costs

After noting the discretion to order costs pursuant to s. 43 of the FCA, and the effect of s. 85A of the NTA on its exercise, Gilmore J found (among other things) that:

- the application for injunctive relief was brought within the substantive proceedings and so, pursuant to s. 85A(1), *prima facie* there would be no order as to costs;
- the issues in this case were complex, on one level, and those seeking the injunction were not represented by a solicitor or counsel;
- in these circumstances, while the application had no reasonable prospects of success, the Walman Yawuru's pursuit of it should not be characterised as 'unreasonable conduct' for the purposes of s. 85A(2). (On unreasonable conduct, see *Birri-Gubba (Cape Upstart) People v Queensland* [2008] FCA 659, summarised in this issue of *Native Title Hot Spots*);
- there was no other basis for departing from the *prima facie* rule under s. 85A and so no order for costs should be made—at [53] to [57].

Decision

Gilmore J dismissed the Walman Yawuru's application for injunctive relief pursuant to s. 31A of the FCA because there were no 'arguable serious issues to be tried' and so no reasonable prospect of success, with no order as to costs—at [52] and [57].

Postscript – appeal finalised, special leave application filed

On 18 July 2008, the Full Court made orders by consent to finalise the appeal proceedings. Pursuant to those orders (among other things), the state's appeal and the Walman Yawuru cross-appeal were dismissed, the Rubibi cross-appeal was allowed in part and the determination of native title made on 28 April 2006 varied to reflect the court's findings on the appeal.

On 15 August 2008, the state filed an application for special leave to appeal against findings made in *Western Australia v Sebastian* [2008] FCAFC 65 that Reserve 631 was not validly create and that Reserve 1647 was not vested in trustees under the *Cemeteries Act 1897* (WA).

Costs

Birri-Gubba (Cape Upstart) People v Queensland [2008] FCA 659

Rares J, 14 May 2008

Issue

The issue for the Federal Court was whether to make an order for costs against the Birri-Gubba People in relation to the State of Queensland's preparation for, and appearance at, directions hearings on the issue of the preservation of evidence. The proposal to preserve evidence was later abandoned by the Birri-Gubba People without any explanation as to why. It was decided the Birri-Gubba People should pay 50 per cent of the state's costs on the basis that they had acted unreasonably so as to cause the state to incur costs unnecessarily.

Background

Central Queensland Land Council (CQLC) represented the Birri-Gubba People in these proceedings, which relate to a claimant application brought on their behalf. At the request of CQLC, orders were made, and a number of directions hearings held, between 1 December 2006 and 17 October 2007 for the purposes of both identifying witnesses whose evidence should be preserved and preparing plans for the conduct of the hearing of that evidence.

On 17 October 2007, a solicitor employed by the CQLC filed an affidavit deposing that she had not received instructions from the applicant group regarding the need to preserve the evidence of any person. The request for preservation hearings was, therefore, abandoned with no explanation as to why there had been a change of course. The state applied for an order for costs against the Birri-Gubba People.

Relevant law

After reviewing the history of the proceedings, his Honour Justice Rares set out the court's general jurisdiction to order costs in s. 43 of the *Federal Court of Australia Act 1976* (Cwlth) (FCA). It was then noted that this power was 'constrained' by s. 85A(1) of the *Native Title Act 1993* (Cwlth) (NTA), pursuant to which the parties to a proceeding must bear their own costs unless the court orders otherwise.

Subsection 85A(2) of the NTA provides that:

> Without limiting the Court's power to make orders under subsection (1), if the Federal Court is satisfied that a party to a proceeding has, by any unreasonable act or omission, caused another party to incur costs...the Court may order the first-mentioned party to pay some or all of those costs.

His Honour noted (among other things) that:

- while s. 85A(1) removed any expectation that costs would follow the event, the court retained an overriding discretion as to costs;
- while the exercise of that discretion did not require a finding that there had been unreasonable conduct, or that special circumstances existed, the extent of the court's discretion in cases where a party had acted unreasonably was put 'beyond doubt' by s. 85A(2);
- the party relying upon s. 85A(2) must satisfy the court that the other party's conduct involved unreasonable acts or omissions that caused the party to incur those costs—at [22] to [23] and [37].

Unreasonable conduct

Rares J decided that:

> [I]t was unreasonable of the Birri-Gubba People to present a total of five lists [of potential witnesses], none of which, on final consideration, produced even one person whom they wished to call this case—at [37].

It was noted (among other things) that:

- the Birri-Gubba People were, at all times, represented by lawyers and the CQLC and so were not unrepresented litigants 'unable to make informed forensic judgements';

- no proper, considered attention was given to the inclusion of any of the persons in the five lists that were provided by CQLC on behalf of the Birri-Gubba People, evidenced by the fact that no such witness was identified;
- on a number of occasions in open court, the state of CQLC's preparation was disclosed as being in 'disarray' and, while no doubt there was a 'sincere attempt' to identify potential witnesses, it did not appear to have been undertaken by a lawyer familiar with litigation;
- further, it was not undertaken with a view to determining whether any of the persons identified ought to be called and what evidence they could give until (ultimately) the forensic decision was taken not to call any of them;
- it should be recognised that substantial costs 'over and above' that which would ordinarily be incurred native title proceedings had been visited upon the state by the unreasonable way the Birri-Gubba People conducted the issue of preservation of evidence;
- it would be unjust to require the state to bear the whole of those costs when all of the preparation for, and appearances at, the various directions hearings on the issue of preservation of evidence had, in the end, been 'a waste of time and resources'—at [37] to [39].

Decision
The state was awarded 50 per cent of its costs relating to the preparation for, and appearance at, directions hearings between 1 December 2006 and 17 October 2007 on the issue of what evidence ought to be preserved—at [40].

Foster v Que Noy (No 2) [2008] FCAFC 137

Finn, North and Reeves JJ, 24 July 2008

Issue
The issue in this case was whether s. 85A of the *Native Title Act 1993* (Cwlth) applied to appeal proceedings. It was held that s. 85A did apply and that there was no factor present that would warrant the making of a costs order.

Background
In *Foster v Que Noy* [2008] FCAFC 56 (summarised in *Native Title Hot Spots* Issue 27), the Full Court of the Federal Court dismissed two appeals by Marjorie Foster against findings that she should be removed as a member of the group comprising 'the applicant' for two claimant applications. (Her removal was ordered pursuant to applications made under s. 66B of the NTA.) The respondents argued that s. 85A did not apply because these were appeal proceedings and sought an order as to costs.

Section 85A applies if proceeding is within the scope of s. 81
Under s. 81, the Federal Court has jurisdiction over applications that 'relate to native title' and it is 'exclusive of the jurisdiction of all other courts except the High Court'. Their Honours Justices Finn, North and Reeves were of the view that:
- 'in the scheme of Pt 3 Div 1 of the Act', an application made under s. 66B 'directly affects the authority of the applicant' to deal with a claimant application;
- 'accordingly', a s. 66B application was 'within the exclusive jurisdiction' found in s. 81;

- as such, it was an application to which s. 85A applies—at [2], referring *The Lardil Peoples v Queensland* (2001) 108 FCR 453 at [68] and [156].

It was noted that:

> It is clear…that an application for leave to appeal and/or an appeal from a proceeding within s 81…attracts the provisions of s 85A no less so than the proceeding at first instance from which leave to appeal is sought, or the appeal is brought—at [4], referring to *De Rose v South Australia (No 3)* [2005] FCAFC 137; *Davidson v Fesl (No 2)* [2005] FCAFC 274 and *Gumana v Northern Territory (No 2)* [2007] FCAFC 168, summarised in *Native Title Hot Spots* Issue 16, Issue 17 and Issue 27 respectively.

Decision

The court decided that no order as to costs should be made because:

- the 'starting point' when applying s. 85A was that the parties will bear their own costs unless the court considers it appropriate to make a costs order;
- while there were 'obvious difficulties' with aspects of Ms Foster's case, there was nothing that would 'warrant a departure' from that starting point;
- the fact that the respondents were wholly successful, both at first instance and on appeal, was not a circumstance that warranted making a costs order—at [6].

Sale of ILC-held pastoral lease

Lapthorne v Indigenous Land Corporation [2008] FCA 682

Siopis J, 7 May 2008

Issue

The main issue in this case was whether, in the absence of any evidence of authorisation, the Federal Court should dismiss an application brought by Andrew Lapthorne in which a claim to native title in relation to a pastoral lease known as Edmund Station was made. The application was dismissed.

Background

The leasehold to Edmund Station was purchased by the Indigenous Land Corporation (ILC) in February 1999 for the cultural needs of the Gnulli People. However, in June 2006 the ILC decided to dispose of the property because it was of the view that neither the Gnulli people nor any other Aboriginal corporation had demonstrated an ability to manage it—see s. 191J(2) of *Aboriginal and Torres Strait Islander Act 2005* (Cwlth).

Mr Lapthorne made an application to the Federal Court on 19 February 2008. This was the same day as his application to extend the caveat he had lodged on the title to the station was dismissed by the Supreme Court of Western Australia. The substantive claim in his application to the Federal Court was that: 'The Thudgari Native Title Claim Group be granted Native Title rights over the area of land which is part of the land known as Edmund Station'.

However, Mr Lapthorne's application was not brought in the form required for the making of a claimant application pursuant to s. 13(1) of the *Native Title Act 1993* (Cwlth) (NTA). There is a claimant application made on behalf of the Thudgari people on foot that covers Edmund Station and Mr Lapthorne is a member of the native title claim group for that application. However, he is not one of the people authorised to make that application and deal with matters in relation to it i.e. he is not one of the group that constitutes 'the applicant' for the Thudgari claimant application.

The sale of Edmund Station was completed on 13 March 2008. The ILC made application for either summary judgment pursuant to s. 31A of the *Federal Court of Australia Act 1976* (Cwlth) or dismissal of the application under O 20 r 5 of the Federal Court Rules.

Decision
His Honour Justice Siopis held that:

- proper authorisation was an essential element for the commencement of a claim for native title and that Mr Lapthorne had not satisfied the requirements of s. 61(1) of the NTA i.e. he had not produced evidence to show that he was authorised by the Thudgari people to make the claim;
- failure to provide such evidence was fatal and, as there was no reasonable prospect of the claim succeeding, it should be dismissed;
- insofar as the claim was one brought for the purposes of seeking to stop the sale of the leasehold interest, the property had already been sold and transferred and so this was 'a futile exercise' – at [13] and [15] to [16].

As a result, Mr Lapthorne's application was dismissed.

Extension of time to comply refused

Bell v Queensland [2008] FCA 840

Collier J, 3 June 2008

Issue
The issue for the Federal Court was whether to extend time for compliance with orders made almost a year earlier in relation to the Barunggam People's claimant application over part of the Darling Downs region in Queensland. Those orders were that the application either be discontinued or amended to address serious flaws relating to the claim group description and authorisation, as required under the *Native Title Act 1993* (Cwlth), in lieu of which it would be dismissed. The date for compliance was 5 June 2008. The court refused to extend time for compliance with those orders.

Background
The applicant sought an extension for time to comply with orders made by her Honour Justice Collier in September 2007, submitting that:

- the applicant's failure to comply was due to difficulties Queensland South Native Title Services had in providing advice on the issues but the applicant was now prepared to hold a meeting to authorise a new claim;
- progress would be made because a senior consultant anthropologist was briefed to report on whether there should be a regional claim or separate claims for each family group.

The court noted (among other things) that:
- at the very least a proper claim group needed to be identified and that it was currently 'fundamentally flawed';
- at a conference held in December 2006, six anthropologists and an historian, all of whom were familiar with the Darling Downs region, had been unable to agree as to the description of the claim group for that region;
- even if yet another expert report was prepared, it would not endorse the application as currently filed;
- allowing the current application to 'limp along' was 'futile'—at [4] to [8].

Decision
The application to extend time for compliance was dismissed and so, as at 5 June 2008, the Barunggam People's claimant application was dismissed.

Grantee party did not negotiate in good faith

Cox/Wintawari Guruma Aboriginal Corporation/Western Australia/FMG Pilbara Pty Ltd [2008] NNTTA 90

Deputy President Sosso, 11 July 2008

Issue
The issue before the National Native Title Tribunal was whether or not FMG Pilbara Pty Ltd (the grantee party) had negotiated in good faith prior to making a future act determination application (FADA) pursuant to ss. 35 and 75 of the *Native Title Act 1993* (Cwth). It was found that the grantee party has not done so and, therefore, that the Tribunal was not empowered to make a determination on the FADA.

Background
The grantee party made a FADA in relation the proposed grant of mining lease 47/4104. The area covered by the application for the lease overlapped part of the area subject to the Puutu, Kunti, Kurrama and Pinikura Peoples' registered claimant application (the first native title party) and part of the area subject to an approved determination of native title made for which the Wintawari Guruma Aboriginal Corporation is the registered native title body corporate (the second native title party).

The grantee party has numerous tenements and tenement proposals in the Pilbara region and had met with various native title parties seeking to negotiate land access agreements in relation to the grantee party's project and mining tenure. The grantee party's summary of the

facts relevant to the negotiations that took place prior to the making of the FADA was not contested.

Both native title parties contended that the grantee did not negotiate in good faith prior to making the FADA. As the issue of good faith goes to the jurisdiction of the Tribunal, it must be dealt with prior to determination of a FADA.

Native title party's contentions

The first native title party had no complaint about the grantee party's conduct of the negotiations but contended (among other things) that:

- all discussions with the grantee were about a claim-wide agreement and the proposed mining lease which was the subject of the FADA was not raised as a priority tenement in any of those discussions;
- land access agreement negotiations between the parties were at an early stage and little of substance had been discussed prior to the grantee making the FADA;
- the grantee did not negotiate about any matters in ss. 33 and 39 of the NTA, the exercise of native title rights and interests, the effect on those interests or significant sites in the mine area and did not make any offer of the kind contemplated by s. 33(1).

The second native title party contended that:

- the negotiations for the whole of claim agreement included relieving the grantee party of the right to negotiate proceedings but, until that agreement was completed, the NTA continued to apply;
- the grantee party's compensation proposals were limited to 'things produced', rather than profits made or income produced;
- given the scale of the grantee party's iron ore mining activities, there was nothing reasonable in the financial package offered by the grantee party.

Legal principles

The Tribunal adopted the analysis of the obligation to negotiate in good faith stated in *Placer (Granny Smith) v Western Australia* (1999) 163 FLR 87 at 93 to 94, noting that:

- once an application is made under ss. 35 and 75, the prior conduct of the parties is the focus of the inquiry and evidence of subsequent negotiations is not relevant, referring to *Cameron v Hoolihan* (2005) 196 FLR 37;
- while there is no statutory obligation for a government or grantee party to negotiate profit or royalty type payments, the failure to agree to negotiate such payments may in some circumstances be an indication of a failure to negotiate in good faith, referring to *Brownley v Western Australia* (1999) 95 FCR 152 at [54] to [55];
- the obligation imposed on a grantee party is to receive and consider fairly any payment proposal but without an obligation to 'capitulate to reach agreement', referring to *Western Australia/West Australian Petroleum Pty Ltd/Hayes* [2001] NNTTA 18 at [37] to [38].

Findings

The Tribunal noted (among other things) that:

- the history of negotiations between the second native title party and the grantee did not reveal that the grantee adopted an unreasonable negotiating position;

- the statutory obligation is to negotiate about the doing of the proposed future act and does not extend beyond negotiating about the effect of the act on the registered native title rights and interests of the native title parties;
- parties are at liberty to subsume individual right to negotiate discussions in negotiations of a broader agreement than the doing of the act;
- the s. 31 requirement to negotiate about the doing of the act in the context of its effect on native title rights and interests cannot be avoided unless there is an explicit agreement to that effect. There was no such agreement between the grantee and first native title party;
- the obligation to negotiate in good faith with the first native title party had not been met when the s. 35 application was lodged as the material indicates the negotiations for a LAA were at an early stage and had not advanced to a stage where the general discussions in themselves could satisfy s. 31(1)(b);
- a grantee party could satisfy s. 31(1)(b) if, even at an early stage of negotiations, there was under a general framework of advanced discussions for the doing of the relevant future act. While other proposed tenements were raised as a priority in bipartite discussions, the proposed mining lease was not the subject of serious negotiations—at [39], [49], [52], [58] and [72] to [74].

It was found that:
- the evidence did not support a finding that the grantee party engaged in disingenuous conduct in its negotiations with the first native title party;
- rather the grantee party was acting honestly but made an error in seeking a future act determination about the proposed mining lease when the negotiations about that tenement were in their infancy;
- the process of negotiations with the second native title party indicated the land access agreement process had stalled;
- if the broader agreement could not be progressed, the onus was on the grantee party to disaggregate the proposed mining lease and revive negotiations about it;
- it would be contrary to the requirement found in s. 31(1)(b) to rely on failed general negotiations which never substantively addressed the proposed mining lease—at [77] and [82].

Decision
The Tribunal found that the grantee party did not discharge its obligation to negotiate in good faith with either of the native title parties and so the Tribunal had no jurisdiction to conduct an inquiry and make a future act determination.

Appeal proceedings
On 7 August 2008, FMG Pilbara Pty Ltd filed an appeal in the Federal Court pursuant to s. 169 of the NTA against the Tribunal's finding that it did not negotiate in good faith.